Public Prosecutor v Sulaiman bin Mohamad Noor

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45-11-1995
ABDUL MALIK ISHAK J
10 NOVEMBER 1995

Criminal Law *— Dangerous Drugs Act — Sections 39B(1)(a) — Trafficking in dangerous drugs — Unclear whether chemist referring to 'cannabis' within s 2 or 'cannabis (Indian Hemp)' under First Schedule — Different offences with different penalties — Whether charge should be amended to a lower charge of possession under s 12(2) — Dangerous Drugs Act 1952 ss 2, 12(2) & 39B(1)(a)*

Evidence *— Expert evidence — Government chemist — Chemist stated in report that material found with the accused was 'cannabis as defined in the Act' — Chemist stated that it was 'cannabis or cannabis (Indian hemp) as defined in s 2 of the Act' in oral testimony in court — Whether chemist could give oral evidence to improve chemist report — Evidence Act 1950 ss 91 & 92*

Evidence *— Burden of proof — Prosecution's burden — Quantum of proof — Evidence was tampered with — Whether prosecution had proved case beyond reasonable doubt*

Words and Phrases *— '... any matter required by law to be reduced to the form of a document ...' — Evidence Act 1950 s 92*

The accused was charged with the offence of trafficking dangerous drugs under s 39B(1)(c) of the Dangerous Drugs Act 1952 ('the Act'). Two issues raised by the defence were, firstly, in relation to the contradictions and uncertainties of the government chemist with regard to the subject matter of the charge, and secondly, the identity of the exhibits. As regards the evidence of the government chemist, the government chemist stated that the material found with the accused was 'cannabis as defined in the Act' in the chemist report, whereas in his oral testimony in court, he stated that it was 'cannabis or cannabis (Indian hemp) as defined in s 2 of the Act'. In relation to the identity of the exhibits, ie the plastic packets containing the cannabis, it was discovered that the evidence had been tampered with. The issues, therefore, were whether: (i) the chemist could give oral evidence to improve the chemist report; and (ii) the tampered evidence had created a doubt on the prosecution's case.

Held, amending charge to one of possession of cannabis (Indian Hemp) under s 12(2) of the Act; acquitting and discharging the accused:

(1) An expert like a government chemist must be very selective in the use of words when testifying in court. A wrong choice of words would be fatal especially when it involves a penal statute that carries with it the mandatory death penalty (see p 201E).

(2) Sections 91 and 92 of the Evidence Act 1950 supplement each other. Only after a document has been produced to prove its terms under s 91 that the provisions of s 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding to or substracting from its terms. Section 91 only prohibits the admission of oral evidence to prove the contents of the document (see p 202E–G).

(3) The words '... any matter required by law to be reduced to the form of a document ...' in s 92 should be read disjunctively from the words preceding it. It follows that unilateral and non-dispositive documents would fall within the scope of s 92 (see pp 205I and 206A).

(4) The chemist report was a unilateral and non-dispositive document falling under the second limb of s 92. The government chemist, therefore, could not in his oral evidence supplement what was not incorporated in the chemist report (see p 206I).

(5) It is now a golden rule of law that throughout the burden is upon the prosecution to prove beyond reasonable doubt that the subject matter of the charge, being the cannabis, was the very thing that was recovered from the house and eventually brought before this court. From the evidence in this case, it was doubtful whether the right exhibits were brought before this court (see p 208C); *Pendakwa Raya v Zainal Abidin bin Mt Sharif* [1993] 2 CLJ 625; [1993] 1 AMR Supp Rep 169 followed.

[Bahasa Malaysia summary

Tertuduh telah didakwa dengan kesalahan pengedaran dadah merbahaya di bawah s 39B(1)(c) Akta Dadah Berbahaya 1952. Dua isu yang dibangkitkan oleh pihak pembela adalah, pertamanya, tentang penyangkalan dan ketidakpastian ahli kimia kerajaan berkaitan dengan hal perkara pertuduhan, dan keduanya, tentang identiti barang kes. Berkenaan dengan keterangan ahli kimia kerajaan, dia menyatakan bahawa material yang didapati bersama tertuduh ialah 'ganja seperti yang ditakrifkan di dalam Akta Dadah Berbahaya 1952' dalam laporannya, manakala dalam keterangan lisannya di mahkamah dia menyatakan bahawa ia merupakan 'ganja atau pun ganja (Indian hemp) seperti ditakrifkan di dalam s 2 Akta Dadah Berbahaya 1952'. Berkaitan dengan identiti barang kes, iaitu bungkusan plastik yang mengandungi ganja, adalah didapati bahawa ia telahpun diusik. Isu yang bangkit adalah sama ada: (i) ahli kimia tersebut boleh memberi keterangan lisan untuk menerangkan laporannya dengan selanjutnya; dan (ii) bukti yang diusik tersebut telah menimbulkan keraguan atas kes pihak pendakwa.

Diputuskan, meminda pertuduhan kepada pemilikan ganja (Indian Hemp) di bawah s 12(2) Akta tersebut; membebas dan melepaskan tertuduh:

(1) Seorang pakar seperti ahli kimia kerajaan mesti berhati-hati dalam penggunaan perkataan ketika memberi keterangan di mahkamah. Pilihan perkataan yang salah akan membawa padah terutamanya apabila melibatkan statut jenayah yang membawa hukuman mati mandatori (lihat ms 201E).

(2) Seksyen-seksyen 91 dan 92 adalah saling bergantungan. Selepas sesuatu dokumen telah dikemukakan untuk membuktikan terma-terma di bawah s 91, barulah peruntukan di bawah s 92 berkuat kuasa untuk menghalang kemasukan keterangan yang termasuk sebarang perjanjian atau pernyataan lisan yang bertujuan untuk menyangkal, mengubah, menambah atau mengurangkan terma-termanya. Seksyen 91 hanya melarang penerimaan keterangan lisan untuk membukti kandungan sesuatu dokumen (lihat ms 202E–G).

(3) Perkataan '... apa-apa perkara dikehendaki oleh undang-undang supaya dituliskan dalam bentuk dokumen ...' dalam s 92 harus dibaca secara disjunktif daripada perkataan-perkataan di hadapannya. Ini bermakna dokumen satu pihak dan tak sempurna adalah tertakluk dalam skop s 92 (lihat ms 205I dan 206A).

(4) Laporan ahli kimia adalah dokumen satu pihak dan tak sempurna yang tertakluk di bawah cabang kedua s 92 Akta Keterangan 1950 tersebut. Oleh itu, ahli kimia kerajaan tidak boleh melalui keterangan lisannya menambah kepada apa yang tidak dikandungi oleh laporan kimia (lihat ms 206I).

(5) Adalah merupakan suatu peraturan yang mantap kini bahawa pihak pendakwa mempunyai beban untuk membukti melampaui keraguan munasabah sepanjang masa bahawa hal perkara pertuduhan, iaitu ganja, merupakan benda yang telah didapati dari rumah itu, dan akhirnya ia dibawa ke mahkamah. Daripada keterangan dalam kes ini, adalah meragukan sama ada bukti yang betul telah dibawa ke mahkamah (lihat ms 208C); *Pendakwa Raya v Zainal Abidin bin Mt Sharif* [1993] 2 CLJ 625; [1993] 1 AMR Supp Rep 169 diikut.]

Notes

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 26–108; [1989] Mallal's Digest 592–621; [1990] Mallal's Digest 463–467; [1991] Mallal's Digest 820–849; [1992] Mallal's Digest 657–671; [1993] Mallal's Digest 526–538; [1994] Mallal's Digest 849–870.

For cases on burden of proof, see 7 *Mallal's Digest* (4th Ed) paras 97–273; [1989] Mallal's Digest 779–783; [1991] Mallal's Digest 1075–1082; [1992] Mallal's Digest 769–772; [1993] Mallal's Digest 526–538; [1994] Mallal's Digest 1266–1281.

Cases referred to

Abdullah bin Awang Bongkok v PP [1956] MLJ 90
Ah Mee v PP [1967] 1 MLJ 220

Datuk Haji Harun bin Haji Idris & Ors v PP [1978] 1 MLJ 240
Doe d Welsh v Langfield (1847) 16 M & W 497
Goodhay v Henry (1829) M & M 319
Herchun Singh & Ors v PP [1969] 2 MLJ 209
Inspector-General of Police & Anor v Alan Noor bin Kamat [1988] 1 MLJ 260
Krishnan v PP [1987] 1 MLJ 292
Ng Ee v PP [1941] MLJ 180
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180
PP v Lee Eng Kooi [1993] 2 MLJ 322
Pavone v PP [1986] 1 MLJ 72
Pendakwa Raya v Zainal Abidin bin Mt. Sharif [1993] 2 CLJ 625; [1993] 1 AMR Supp Rep 169
R v Bourdon (1847) 7 Car & K 366
R v Fearshire (1779) 1 Lea 201
R v Harris (1832) 1 Mood 338
R v Phillips (1818) R & R 368
Shukri bin Mohamad v PP [1995] 3 MLJ 229
Thomas v Ansley (1806) 6 Esp 80

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 399, 399(3)
Dangerous Drugs Act 1952 ss 2, 12(2), 12(3), 39B(1)(c), First Schedule
Evidence Act 1950 ss 91, 92

Haslinda Abu Bakar and *Iskandar Shah Ibrahim* (Deputy Public Prosecutors) for the prosecution.
Hisham Teh Poh Teik (*Teh Poh Teik & Co*) for the accused.

Abdul Malik Ishak J: The accused was acquitted and discharged at the close of the case for the prosecution on the following amended charge:

> Bahawa kamu, pada 18 Mei 1994, jam lebih kurang 2.20 petang di rumah No 28B, Jalan Lurah 12, Kempas Baru, Tampoi, dalam daerah Johor Bahru, Johor telah bagi pihak diri kamu sendiri melakukan satu perbuatan sebagai persediaan untuk memperedarkan dadah berbahaya, iaitu sejumlah 634.7g ganja, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(c) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

It would be tedious in the extreme to rehearse and repeat in detail the facts of the case. Suffice for me to say that both ASP Abu Bakar bin Mohamad ('SP4' – 'Bakar') and Detective Lance Corporal 84882 Abdul Salam bin Haji Zabidi ('SP5' –'Salam') witnessed through the window naco of the rear portion of the house just prior to the raid, the accused (in shorts and barebodied) squatting on the floor of the kitchen and filling dried leaves, believed to be cannabis, which was placed on a newspaper ('P6A') into small plastic packets. This was indeed a damning piece of evidence unfolded in the course of the trial. I have no hesitation to believe both Bakar and

Salam on this point. Now, as soon as Bakar gave the signal to enter the premises, it was Bakar himself who entered the rear portion of the house wherein the accused was located, followed by Salam and Detective Lance Corporal 88755 Mohd Zaki ('Zaki'). The entry to the kitchen portion was made possible by the grille door that was not locked and the wooden door that was ajar. As soon as Bakar gained entry into the kitchen portion, he shouted, 'Polis!', and immediately thereafter, the accused stood up and pushed his way out of the kitchen. Bakar was helpless. Even Salam, who was about to enter the kitchen, was pushed aside by the accused. The accused fled for his dear life. Salam and Zaki who gave chase eventually gave up as the accused could not be seen. Back at the house, Bakar directed Chief Inspector Zulkifli bin Ali ('SP7' – 'Zulkifli') to collect the scattered dried leaves believed to be cannabis found on the kitchen floor, which must have been put in disarray when the accused fled helter-skelter from the kitchen. Zulkifli managed to gather the dried leaves believed to be cannabis ('P6B') on the floor of the kitchen portion and placed it neatly on the newspaper ('P6A'). Zulkifli, too, recovered a yellow plastic bag ('P5A') containing 27 small plastic packets. Inside each of these 27 small plastic packets were dried leaves believed to be cannabis ('P5B1' to'P5B27'). Zulkifli also recovered 15 small plastic packets, and inside each of them were dried leaves believed to be cannabis ('P4A1' to 'P4A15'). Apart from that, Zulkifli also recovered a transparent plastic packet ('P7A'), and inside it were several pieces of empty plastic packets ('P7B'). Finally, Zulkifli recovered a used candle ('P7C'). It is pertinent to point out that whatever Zulkifli did in so far as the exhibits were concerned, was done in the presence of Bakar. It was in evidence that Zulkifli handed those exhibits seized from the house to Bakar and throughout, thereafter, Bakar held onto those exhibits till it was eventually handed over to the investigating officer of the case, one DSP Suraji bin Abdul Hamid ('SP15' – 'Suraji'). The wife of the accused, by the name of Aminah bte Omar ('SP12' – 'Aminah'), who was hanging clothes outside the house at the time of the raid, and her four children, were arrested and brought to the CAD Johor Bahru. In due course, the government chemist analyzed the dried leaves and confirmed that they were cannabis, altogether 634.7g. The accused, who was still on the run, was eventually arrested by Chief Insp Nordin bin Kadir ('SP6' – 'Nordin') and when he was arrested, he was still wearing the same shorts and an old T-shirt given to him by Ya'akup bin Awang ('SP8' – 'Ya'akup'). Within a short compass, these were the facts of the case.

Mr Hisham Teh Poh Teik, the learned counsel for the accused, raised two very pertinent points at the close of the prosecution's case, and invited this court to acquit and discharge the accused forthwith without the need to call for his defence. The two infirmities highlighted by Mr Hisham Teh Poh Teik were:

(1) the contradictions and uncertainties of the government chemist in regard to the subject matter of the charge; and

(2) the identity of the exhibits.

The first issue

It is quite apparent that the government chemist was not able to answer a simple question like:

> Dalam kes kita, barang kes ini bukan Hemp dari India ?

and sought to reply in this manner:

> Indian hemp sebenarnya sinonim dengan cannabis sama juga seperti dengan ganja dan marijuana dan lain-lain.

But, the government chemist agreed that the words 'ganja' and 'marijuana' are not defined in s 2 of the Dangerous Drugs Act 1952 ('the Act'), and that the words 'Indian Hemp' appeared in Pt III of the First Schedule to the Act in this fashion: 'Cannabis (Indian Hemp)'. But, what is startling is the government chemist's oral testimony that:

> Ganja atau pun ganja (Hemp dari India) adalah seperti ditakrifkan di dalam s 2 Akta Dadah Berbahaya 1952.

Admittedly, this must be a grave mistake that went to the substratum of the whole case. An expert, like the government chemist, must be very selective in the use of words when testifying in court. A wrong choice of words would be fatal especially when it involves a penal statute that carries with it the mandatory death penalty. A perusal of the Act would show that only cannabis is defined under s 2 thereof, whereas there is no definition of the words 'cannabis (Indian Hemp)' in the Act. Be that as it may, it is the government chemist's assertion that the cannabis in this case is as defined in s 2 of the Act. The learned deputy public prosecutor Cik Haslinda bte Abu Bakar, assisted by her colleague of the same rank, one Encik Iskandar Shah Ibrahim, argued and sought to impress upon this court that, by referring to the term 'cannabis' as defined in s 2 of the Act, the government chemist has squarely brought the subject matter of the case within the four walls of *Shukri bin Mohamad v PP* [1995] 3 MLJ 229. In *Shukri bin Mohamad,* the government chemist there merely testified that the substance which he analyzed was 'cannabis as defined in the Dangerous Drugs Act 1952' and their Lordships of the Federal Court [the then Supreme Court] held, inter alia, that the omission to refer to s 2 of the Act could give rise to the inference that the government chemist did not have in his mind the ingredients of cannabis as defined therein. Incidentally, there were two other defects in *Shukri bin Mohamad* which are not apparent here. It is this. In *Shukri bin Mohamad,* the government chemist there failed to mention the results of his physical examination, nor did he mention whether he carried out any tests. Because of these infirmities, their Lordships of the Federal Court amended the charge to one of possession of cannabis (Indian Hemp) under s 12(2) of the Act and punishable under s 12(3) of the Act, and consequently imposed a sentence of five years imprisonment with effect from the date of arrest.

In the course of leading evidence through the government chemist, the learned deputy public prosecutor Cik Haslinda Abu Bakar tendered the chemist report of the government chemist as 'P13', which was not objected to at all by the learned defence counsel, as there was compliance with the proviso of s 399(1) of the Criminal Procedure Code ('the CPC'). The chemist report (P13) bore the defect as highlighted in *Shukri bin Mohamad*. At p 2 of the chemist report (P13), the government chemist categorically stated that:

> Ganja adalah seperti yang ditakrifkan di dalam Akta Dadah Berbahaya 1952.

The chemist report (P13) was prepared on 28 June 1994 and, because of this, I cannot help but observe that the government chemist had acted on hindsight, more of an afterthought when he testified orally that the subject matter or the case was cannabis as defined in section 2 of the Act - clearly an attempt to tailor his evidence within *Shukri*'s case which was decided on 9 October 1995. Indeed, that was a clear attempt to testify and go against the chemist report (P13).

This immediately brings to the forefront ss 91 and 92 of the Evidence Act 1950. It is only after the document has been produced to prove its terms under s 91 that the provisions of s 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. In my judgment, ss 91 and 92 really supplement each other. It is because s 91 by itself would not have excluded evidence of oral agreements which may tend to vary the terms of the document that s 92 has been enacted, and if s 92 does not apply in the present case, there is no other section in the Evidence Act 1950 which can be said to exclude the oral evidence of the government chemist in so far as it is intended to contradict, vary, add to, or subtract the terms of the chemist report (P13). What s 91 prohibits is the admission of oral evidence to prove the contents of the document. In the present case, the terms of the document are proved by the production of the document itself namely, the chemist report (P13). Whether or not the said terms could be varied by oral testimony of the government chemist is a matter which is not covered by s 91 at all. That is the subject matter of s 92 and so, if s 92 applies, it means the government chemist cannot give oral evidence to improve the chemist report (P13).

I now propose to elaborate on the scope of the words '... any matter required by law to be reduced to the form of a document ...' appearing in s 92 of the Evidence Act 1950. For this exercise, I need to refer to some authorities which I consider germane to the occasion. The first would be *Ah Mee v PP* [1967] 1 MLJ 220 FC, where the appellant there had been convicted of rape. One of the grounds of appeal was the reception of inadmissible evidence in a material particular. The complainant had, clearly and unmistakably, given the number of the appellant's car as M7354 in her police report. In truth, it was M6049, whereas M7354

belonged to a motorized grass-cutter which had become defunct since 1957. The judge, nevertheless, accepted her explanation of an honest mistake, that she was uncertain about it when the police requested her to give the number of the vehicle involved. On this issue, Ong Hock Thye FJ (as he then was) in delivering the judgment of the Federal Court, said at p 223:

> Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that 'in all cases in which any matter is required by law to be reduced in the form of the a document, no evidence shall be given in proof of the terms ... of such matter except the document itself.' The report was information relating to the commission of an offence which 'shall be reduced to writing' pursuant to s 107 of the Criminal Procedure Code (Cap 6), and s 92 of the Evidence Ordinance goes on to exclude all parol evidence seeking to contradict or vary what was set out in writing. Hence it should have remained uncontradicted, on the prosecution evidence, that whoever might have raped the complainant he was certainly not this appellant, as owner of the vehicle M7354. Not to put too fine a point on it, one might have thought an inadvertent transposition of one or two digits quite possible and probable due to a genuine lapse of memory, but for the complainant to suggest that she could honestly have believed that '7354' bears any relation whatsoever to '6049' passes all understanding.

The second case under consideration would be *Inspector General of Police & Anor v Alan Noor bin Kamat* [1988] 1 MLJ 260 SC, where at p 261 Salleh Abas LP observed in trenchant terms the impact of ss 91 and 92 of the Evidence Act 1950. This was what his Lordship said:

> As regards the first issue, we are of the view that the learned judge was correct. The respondent was at the material time a probationary police inspector and as such, according to the instrument of delegation of power by the Police Service Commission dated 18 February 1971 (PU(B) 548/75), the IGP was the proper disciplinary authority, he being vested with the delegated power to take disciplinary proceedings against 'all senior police officers of the rank of probationary inspector up to and including chief inspector' (vide item 15 of the Instrument of Delegations). But what happened in this case was that the show cause letter dated 14 May 1980, which was signed by the penolong Pengarah Pengurusan (Tatatertib) on behalf of the IGP, had clearly stated that the letter was sent on the direction not of the IGP but of the Deputy IGP. Although the letter dated 21 August 1981 conveying the punishment appeared to have been written on the instruction of the IGP, in our judgment this does not satisfy the requirement of the GOD 30. The authority informing the punishment must be the same authority that instructs the proceeding leading to the punishment. Oral evidence was led to the effect that the IGP gave his instructions to his deputy to initiate the impugned disciplinary proceeding. In our view, such evidence should not be admitted and if admitted should not be acted upon because it is clear that under s 91 of the Evidence Act no evidence can be given in proof of any matter which is required by law to be reduced to a form of a document and s 92 prohibits the giving of oral evidence to contradict or vary or explain the terms of such document. A show cause

> letter has to be in the form of a document because para 2 of GOD 30 required a disciplinary authority to send to the officer who is subject to a disciplinary proceeding 'a statement in writing, prepared, if necessary, with the aid of the legal department.

It is crystal clear that just like *Ah Mee*'s case, the ratio of *Inspector General of Police & Anor v Alan Noor bin Kamat* to the effect that the document tendered should remain uncontradicted (see the related cases of *Pavone v PP* [1986] 1 MLJ 72 and *PP v Lee Eng Kooi* [1993] 2 MLJ 322), is not free from difficulty. For instance, in *Herchun Singh & Ors v PP* [1969] 2 MLJ 209 FC, it was argued there that the police report in that case taken down by a police constable contained contradictions. Ong Hock Thye CJ (Malaya) (as he then was) accepted the finding of fact of the trial judge that the report which was taken down contained errors and omissions for which the constable alone was responsible.

Next would be the case of *Ng Ee v PP* [1941] MLJ 180, where it was necessary for the prosecution to prove the seating capacity of a vehicle. This was a matter that the law required to be recorded on the licence. A police constable gave oral evidence to the effect that 'the bus could carry 16 passengers'. In ruling that as inadmissible, Cussen J said succinctly at para 82:

> Now it is evident that to prove an offence against Rule 65, it is necessary for the prosecution to prove by admissible evidence what the seating capacity of the vehicle is as calculated in accordance with the provisions of the Motor Vehicles (Registration and Licensing) Rules 1937.

That is a matter which the law requires shall be recorded on the licence (Rule 19 (ii)(b)).

It appears to me, therefore, that s 91 of the Evidence Enactment applies, and that no evidence may be given in proof of the terms of such matter except the document, ie, the licence, or secondary evidence of its contents when secondary evidence is admissible.

In this present case, neither the licence itself nor secondary evidence of its contents was in evidence before the court.

Primary evidence of the contents of the licence would have meant the inspection of the licence itself by the court. Although as provided by Rule 9, the licence is carried on the vehicle, it might be inconvenient to everybody to have the vehicle produced to the court; but secondary evidence was easily obtainable either by a copy of the licence obtained under Rule 33 or by the oral evidence as to the contents of the licence by some person who has seen it (in this case, some police officer).

Now, in the record of evidence in this present case, no reference whatsoever is made to the licence. In fact, there is no evidence to show that the vehicle in question was licensed as a 'public service vehicle'. There is some evidence that it was a licensed vehicle because it is referred to as PA1394; but that only shows it was 'licensed', it does not show it was licensed as a 'public service vehicle'.

A The prosecution rely on the evidence of one of the police constables that 'the bus could carry 16 passengers'.

That, in my opinion, apart from its obvious ambiguity, is not secondary evidence of the seating capacity as recorded in the licence.

It is instructive, at this juncture, to refer to the case of *PP v Datuk* B *Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, where at p 183 Abdoolcader J (as he then was) said:

> I should also at this stage refer to the submission of counsel for the second accused that no evidence which would in any way contradict, vary, add to or subtract from the minutes of the board meetings of the bank is admissible C by virtue of the provisions of ss 91 and 92 of the Evidence Act 1950, notwithstanding profuse examination and cross-examination on the minutes throughout these proceedings. This submission on a point of law should perhaps be considered and disposed of before I come to deal with the evidence and is, as I understand it, premised on the provisions of by-law 50 which prescribes that all matters deliberated or decided upon at a board and D general meeting shall be recorded in a minute book and signed by the secretary and the chairman on confirmation of the minutes. Counsel for the second accused argues that this is therefore a matter required by law to be reduced to the form of a document and accordingly comes within the provisions of ss 91 and 92 of the Evidence Act. I cannot accept that contention for two reasons. Firstly, it is clear from the terms of by-law 50 E that what should be recorded in the minute book are only matters deliberated or decided upon, and the minutes cannot therefore be fully exhaustive of everything that transpires at such meetings. And secondly, in the context of the wording in s 92 of the Evidence Act, the clause 'any matter required by law to be reduced to the form of a document' would appear to refer to bilateral instruments and dispositive documents only, such as contracts, F grants or other disposition of property which the law requires to be reduced to writing, and not to every and all matters which the law requires to be reduced into a document, as, for instance, the depositions of witnesses which, though required by law to be reduced to the form of a document, would not come within this section and oral evidence is therefore admissible to contradict such depositions.

G It is interesting to point out that the then Federal Court in *Datuk Harun bin Haji Idris & Ors v PP* [1978] 1 MLJ 240 at p 247, in one sentence, namely, 'with respect we agree with the trial judge that they were admissible for the reasons given by him', affirmed that part of the decision of Abdoolcader J (as he then was) in *Datuk Harun Idris'* case as set out above.

H Now, on the perusal of s 92 of the Evidence Act 1950, the words '... any matter required by law to be reduced to the form of a document ...' which appear immediately before the word 'or', and before the word 'or' there is a comma employed therein which must surely mean that the words '... any matter required by law to be reduced to the form of a document ...' I be read disjunctively from the words preceding it like 'When the terms of any such contract, grant or other disposition of property, or ...'. Taken from this angle, then the proper construction would be to say that unilateral

and non-dispositive documents would also fall within the scope of s 92 of the Evidence Act 1950.

In my research, I discovered that there is a vast and various host of statutes which compel reduction into writing, both foreign and local. The provision that imposes a duty to reduce a charge to writing is but one example (*R v Fearshire* (1779) 1 Lea 201). Yet again it was said that civil claims may also be required to be reduced to writing (*Doe d Welsh v Langfield* (1847) 16 M & W 497). And if prosecutions must be brought within a stipulated time frame, and the prosecutor wishes to prove that that was the case, he must prove it by producing the written warrant to commit or apprehend (*R v Phillips* (1818) R & R 368). It must not be forgotten that the record of conviction is the sole evidence of lawful custody under a sentence of imprisonment where statute directs the court to reduce the conviction to record (*R v Bourdon* (1847) 7 Car & K 366). Even s 24 of the Evidence Act 1950 which empowers a 'person in authority' to record a confession imposes a duty on them to record in writing by necessary implication, if the power is exercised. Consequently, parol evidence may not contradict the recorded confession (*R v Harris* (1832) 1 Mood 338 and *Abdullah bin Awang Bongkok v PP* [1956] MLJ 90). Again, if a competency of a witness is clouded by his bankruptcy, then it is incumbent on him to prove by his certificate of bankruptcy and release thereof (*Goodhay v Henry* (1829) M & M 319). Likewise, the issue and notice of a trial indorsed therein will be the only evidence of the date of the trial (*Thomas v Ansley* (1806) 6 Esp 80). All the above examples must surely be unilateral and non-dispositive and that being the case, in my judgment, the above examples would be caught under the second limb of s 92 of the Evidence Act 1950.

Now, reverting back to the present case, when the government chemist prepared the chemist report (P13) under s 399 of the CPC, it imposed an obligation on him to state the truth. That this is so is clearly reflected by the clear words employed in s 399(3) of the CPC which reads as follows:

> The persons referred to in subsection (2) of this section (this includes the Government chemist) and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

That being the case, the government chemist must have stated the truth in his chemist report (P13), especially that part which is of crucial importance after *Shukri*'s case, namely, whether the government chemist omitted to refer to s 2 of the Act when he defined the term 'cannabis'. It is now apparent that there was this notable absence of any reference to s 2 of the Act, and in view of my stand that s 92 of the Evidence Act 1950 should relate to unilateral and non-dispositive document in relation to the words, '... any matter required by law to be reduced to the form of a document ...'. I hold, and it is my judgment, that the government chemist cannot supplement what was not incorporated in his chemist report (P13) by way of oral testimony. The conclusion is obvious. The charge should be amended to one of possession of cannabis (Indian Hemp) under s 12(2) of the Act

A and punishable under s 12(3) of the Act. However, any amendment in this direction must also fulfill the all important acid test that the correct exhibits were produced before this court, and this brings me to the second issue as propounded by Mr Hisham Teh Poh Teik.

B *The second issue*

It was argued that the 15 small plastic packets containing the cannabis were labelled as E1 to E15 ('P4A1' to 'P4A15'). According to Suraji, when he took custody of these exhibits from Bakar he found the 'mouths' or openings of E3 to E9 were opened and he took the initiative of stapling each of them. The government chemist testified that when he examined C E1 to E15 he discovered that E3, E4, E5 and E9 were stapled. What had happened to E6, E7 and E8? Who had in fact stapled E6, E7 and E8? Why was there no explanation for these discrepancies? The government chemist testified that the 'mouths' or openings of E6, E7 and E8 were heatsealed and not stapled. Going by the evidence of the government chemist the D crucial question to pose is this: Who has tampered with E6, E7 and E8?

In regard to the other 27 small plastic packets containing the cannabis, which were labelled by Bakar as F1 to F27 ('P5B1' to 'P5B27'), the same mistakes were detected. Suraji testified that he stapled only four packets, namely, F23, F24, F25 and F26. Bakar initially testified that only F23, E F24 and F25 were not heatsealed but later, under re-examination, he stated that F26 was also not heatsealed. The government chemist, however, testified that he found only three small plastic packets that were stapled, namely, F23, F24 and F25. The same observations can be made here. Of pertinence would be this nagging question: who has tampered with the exhibits?

F Next, the colour photograph at 'P11C' depicting the newspaper ('P6A') and the loose cannabis ('P6B') warrant comment. The colour photograph at P11C was taken on 19 May 1994 at 4pm and in that photograph there was only one signature and one date (18 May 1994) appearing therein which was said to be that of Bakar. From the colour G photograph at P11C, it visually shows Bakar's signature and the date written by Bakar in blue ink. On perusal of the newspaper itself (P6A), one will discover two signatures and two dates written on it. The additional signature and date were written by Suraji and these were in black ink. The date which Suraji wrote on the newspaper (P6A) was 18 May 1994. Now the question to ask is this: why wasn't Suraji's signature and the date H written by him shown in the colour photograph at P11C, after all, that photograph was taken on 19 May 1994? There was no explanation at all by the prosecution for this mishap, and surely this would be fatal as a doubt is created in regard to the subject matter of the offence. I am reminded of what Wan Suleiman SCJ said in *Krishnan v PP* [1987] 1 MLJ I 292 at p 295. His Lordship lucidly expounded the law in these terms:

> It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the

stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case, the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

It is now a golden rule of law that throughout the burden is upon the prosecution to prove beyond reasonable doubt that the subject matter of the charge, being the cannabis, was the very thing that was recovered from the house and eventually brought before this court. The discrepancies highlighted above raised nagging doubts whether the right exhibits were brought before this court (*Pendakwa Raya v Zainal Abidin bin Mt Sharif* [1993] 2 CLJ 625; [1993] 1 AMR Supp Rep 169 and the cases cited therein), and the upshot of it all was that the accused was entitled to be acquitted and discharged forthwith. This was, in the circumstances, the only recourse open to me.

Accused acquitted and discharged.

Reported by Kenneth Goh